UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE MIRANDA M. DU, CHIEF DISTRICT JUDGE
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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	**No. 3:20-cr-26-MMD-WGC**
	:	
-vs-	:	**January 22, 2021**
	:	
GUSTAVO CARRILLO-LOPEZ,	:	**Reno, Nevada**
	:	
Defendant.	:	
	:	

TRANSCRIPT OF MOTION HEARING

APPEARANCES:

FOR THE GOVERNMENT: **PETER WALKINGSHAW**
Assistant United States Attorney
Reno, Nevada

FOR THE DEFENDANT: **LAUREN GORMAN and KATE BERRY**
Assistant Federal Public Defenders
Reno, Nevada

CERTIFIED INTERPRETER: **JUDY JENNER**

Reported by: **Margaret E. Griener, CCR #3, FCRR**
Official Reporter
400 South Virginia Street
Reno, Nevada 89501

RENO, NEVADA, FRIDAY, JANUARY 22, 2021, 10:00 A.M.

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THE CLERK: Case 3:20-CR-26-MMD-WGC, USA versus Gustavo Carrillo-Lopez.

The Spanish interpreter has been sworn.

Defendant is in custody at Warm Springs Correction Center. He is on the telephone with the interpreter.

Present on Zoom for the government is Peter Walkingshaw. Present on Zoom for the defendant is Lauren Gorman. Kate Berry listens to the proceeding via telephone.

THE COURT: All right. Good morning, everyone.

This hearing is set on the defendant's motion to dismiss the indictment which is docket number 26, and for the record I have reviewed the government's response, defendant's reply, as well as the two supplements the defendant filed.

I'm going to give the government the opportunity to respond at least to the last supplement, which I still don't understand why it was filed shortly before the hearing even though the information offered could have been offered in connection with the motion or even the reply.

I also want to assess from this hearing whether or not I should have an evidentiary hearing so I'm going to -- I'll decide that at the conclusion of the hearing.

I want to address a preliminary issue and that is that, for the record, the defendant, Mr. Carrillo-Lopez, is participating in this hearing by phone. This hearing is conducted virtually with counsel on video and Mr. Carrillo-Lopez on the phone.

I want to make sure that Mr. Carrillo-Lopez understands, and I'm going to pose these questions to him.

Mr. Carrillo-Lopez, I want to make sure you understand that you have a right to have this hearing be conducted in person and that you have a right to attend this hearing in person, but it is a right that you can waive, and if you waive that right, the hearing can proceed with you participating on the phone.

Do you understand that you have those rights?

THE DEFENDANT: Yes. Yes, I do understand.

THE COURT: Did you talk to your attorney about your right to appear at this hearing in person and your decision to waive that right?

THE DEFENDANT: Yes, I did. I did talk to her about it.

THE COURT: And after talking to your attorney, is it your decision to agree to have this hearing be conducted on video and with you listening on the phone?

THE DEFENDANT: Yes, I am. I am in agreement.

THE COURT: All right. I have reviewed

Mr. Carrillo-Lopez's waiver of his right to appear at this hearing in person which is ECF number 34. I find that he understands his right, and that his waiver is a knowing and voluntary waiver.

I also find that because of the spread of COVID-19 in this district, having this hearing proceed in person would affect the health and safety of everyone involved, but that delaying the hearing would not serve the interests of justice, and for those reasons I'm going to accept the waiver and proceed with this hearing with Mr. Carrillo-Lopez participating by phone.

So as indicated to you, counsel, I don't know yet whether or not an evidentiary hearing is warranted. As it stands, Ms. Gorman has requested an evidentiary hearing, the government has not. The government, of course, can change its position. I'll decide at the end of the hearing whether an evidentiary hearing is needed.

I also want you to focus your arguments with the understanding that I'm going to find that the *Arlington Heights* framework applies, and that is that the defendant's argument here is that the statute -- that Section 1326 violates his Equal Protection rights by way of a disparate impact theory so I think that the framework of *Arlington Heights* applies. You can focus your arguments on that.

With that, I will hear arguments from counsel, and I will start with Ms. Gorman.

MS. GORMAN: Thank you, your Honor.

And, your Honor, I would ask that the Court consider hearing the testimony of the -- particularly the historian Professor Hernandez from UCLA. She's a recipient of the MacArthur Grant, and she has studied and written extensively about the statute and its historical origins.

And I would also invite the Court to interrupt me at any time. I had initially prepared an oral argument which is rather lengthy, and -- but I want to be as responsive as possible to this Court's concerns, so please feel free to interrupt me at any time.

But since this Court has already held that the *Arlington Heights* factors applies, I think that the appropriate place is to start with the legislative history of this case and particularly the government's arguments regarding the reenactments.

In terms of the statute that was passed in 1929, that historical framework is extremely important. Much of it is in the Congressional Records, but as the Court has read from the declaration of Professor Hernandez and from the legislative history provided to the Court, the initial idea to criminalize reentering the United States after deportation was initially -- that was the 1929 legislation which exists in

substantially the same form today despite these reenactments which essentially make it even more punitive and more harsh.

THE COURT: But wasn't there enough of a sufficient break between the 1929 statute and the 1952 version of the statute and enactment such that -- so this is where I -- one of the issues for me, is there enough of a -- was the 1952 reenactment sufficiently distanced from the 1929 statute such that even if the legislative history indicates discriminatory intent, that it cannot be considered with the 1952 enactment?

MS. GORMAN: Your Honor, I think the answer to that question is no, and I don't think that it's -- that it can never be the case that a legislative reenactment -- during this case it was largely just a recodification -- can save legislation that is essentially the result of pervasive racial animus.

But one thing that I -- one of the questions that this Court asked at the beginning of the hearing is why I filed that supplement after the case was already briefed, and the short answer is nothing too exciting other than in doing as much of a deep dive as I could into the 1952 legislation I came across a few things.

One is a 1977 case which I'll read into the record, *United States versus Ortiz-Martinez*, 557 F.2d 214, and I'm quoting from 216, and it specifically says, "Regarding the

reenactment of this legislation" -- sorry.

"An exhaustive reading of the congressional debate indicates that Congress was deeply concerned with many facets of the Immigration and Nationality Act of June 27th, 1952, but sections 1325 and 1326 were not among the debated sections."

"The House Report contains only this brief description of the sections."

Quote, "In addition to the foregoing, criminal sanctions are provided for entry of an alien at an improper time or place, for misrepresentation and concealment of facts, for reentry of certain deported aliens..."

And then it quotes to the 1952 Congressional Record, and, of course, your Honor has that case as part of the supplements.

Another interesting fact that I came across is that President Truman actually vetoed this bill. His veto was ultimately overridden, but one of the comments he made in vetoing it were that,

"Many of the aspects of the bill which have been most widely criticized in the public debate are reaffirmations or elaborations of the existing statutes or administrative procedures. Time and again, examination discloses that the revisions of

existing law that would be made by the bill are intended to solidify some restrictive practice of our immigration authorities, or to overrule or modify some ameliorative decision of the Supreme Court or other federal courts. By and large, the changes that would be made by the bill do not depart from the basically restrictive spirit of our existing law but intensify and reinforce it."

That veto was overturned, but it was also very prescient. And I think part of the -- the reason that precipitate, I think, the challenge that we are raising now -- and it's not just me who is raising it but multiple federal defenders have raised an Equal Protection challenge -- also comes from Supreme Court dicta in two cases in 2020.

So -- and I'm referring to the *Espinoza* case and the *Ramos* case. In particular I'll highlight Justice Alito's statements in *Espinoza*.

"I argued in dissent that this original motivation, though deplorable, had no bearing on the law's constitutionality because such laws can be adopted for nondiscriminatory reasons, and 'both states readopted their rules under different circumstances in later years.' But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here."

And that would be *Espinoza v Montana Department of Revenue*, 140 Supreme Court 2246 at 2268.

THE COURT: So if the original -- the legislative history of the original enactment, the 1929 enactment, matters in terms of demonstrating discriminatory intent, can a later reenactment ever be untainted absent some kind of specific repudiation from Congress?

MS. GORMAN: I think the answer to that is nuanced.

I think that what the Supreme Court has stated now in dicta stems from multiple cases even before *Ramos* and even before *Espinoza.*

But one of the Justice Sotomayor's -- one of the statements she made in the *Ramos* case I think speaks to that specific issue, and as I pointed out in the motion, Supreme Court dicta should be entitled to great weight.

So *Ramos* was a Sixth Amendment case, but Justice Sotomayor actually talked about it in the context of Equal Protection. So she states that,

> **"The majority vividly describes the legacy of racism that generated Louisiana's and Oregon's laws. Although *Ramos* does not bring an Equal Protection challenge, the history is worthy of the Court's attention. That is not simply because that legacy existed in the first place -- unfortunately, many**

laws and policies in this country have some history of racial animus -- but also because the states' legislatures never truly grappled with the laws' sordid history in reenacting them."

And she cites *United States v Fordice*," which stands for "policies that are 'traceable' to a state's *de jure* racial segregation and still 'have discriminatory effects' offend the Equal Protection Clause."

So, "Where a law is otherwise untethered to racial bias -- and perhaps when a legislature actually confronts the law's tawdry past in reenacting it -- the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here. While the dissent points to the 'legitimate' reasons for Louisiana's reenactment...Louisiana's perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether."

So I think the short answer to that is no. This is essentially the same law it criminalizes, and the fact that the government has continued to double down on this law I think makes it worse. I think it's contrary to the government's position that it cleanses it from racial animus.

And this Court can see, I think, even from this state -- one of the -- first of all, one of the supplements that I filed was also the U.S. Attorney Bulletin from 2017, and, again, nothing particularly interesting other than the United States Attorney has long described this law as hundred-year history, and that has always been in sort of defense of this law.

And it is only when we do this legislative probing and talk about the historical context of the law that the United States wants to back away from the statement that 1929 was essentially the first version of this act and since then it has gotten even more punitive.

And as this Court, of course, knows, it's far easier to reenact legislation that already exists or to tweak legislation that already exists.

But that original enactment was clearly motivated by racism. It was a compromise between eugenicists and particularly agricultural sectors who wanted to maintain a cheap supply of Mexican labor.

And I think that the Court also sees that in practice this court has a discriminatory effect. I don't think that it was probably ever lost on this Court that 1326 cases have always been treated differently than other cases.

I talked in one of the -- or in one of the

supplements that I filed I provided information, for example, about Operation Streamline.

So under the prior administration, the United States Attorneys were told you have no discretion, we're going to focus on the southern border and you will take every one of these cases, and Operation Streamline actually precedes that. It started 2005 under the Bush administration, and it allowed for these giant mass proceedings, and one of the cases I provided to this Court held that that proceeding violated Rule 11.

But I would ask this Court to imagine a kind of mass proceeding with a hundred brown people shackled to each other and arraigned, pled, and sentenced in the same exact proceeding, and ask whether that would truly happen today if racial animus was not still so very deeply a part of this law.

And I think that reenactment has potentially given courts a way to avoid actually reckoning with the racism that is at the heart of this law, that that racism is apparent at every part of this.

Our 1326 clients -- the Bail Reform Act explicitly applies to them, but it actually doesn't in practice. They don't get released. I've had one 1326 client released in ten years and that was after a trial.

But at the end of the day our 1326 clients continue to be treated differently, and the focus of the

government is on the southern border.

And we also have neighbors to the north that are treated very differently. A, they're not prosecuted, but also the law is tailored so that they won't be prosecuted. For example, if you're going to come to America from Mexico, you need a visa. You do not need a visa to come from Canada, and we do not criminalize visa over-stayers.

So every facet of this law from its original inception to the way that it is currently prosecuted and treated I think displays this animus in full force.

And I think the great danger --

THE COURT: So what you cite to, though, is -- I see it as the disparate impact of the law as applied which is a different -- I see it as a separate analysis from evidence of discriminatory intent or purpose.

I know the government's argument is that there's no disparate impact, that geography plays a factor. I don't agree with that, but I also think that the way the law has been enforced, as I said, may show -- supports the argument there's disparate impact, but I don't know that it supports the discriminatory intent as evidence when the law was enacted.

But let me -- I want to go back to something you indicated earlier. You cited to the *Ortiz-Martinez* decision in the supplement, that's ECF 33, and specifically you

indicated that in that case the Court noted that -- and I'm going to quote,

"An exhaustive reading of the Congressional debate indicates that Congress was deeply concerned with many facets of the Immigration and Nationality Act of June 27, 1952, but 1325 and 1326 were not among the debated actions."

So my question is, doesn't that imply that there was no formal repudiation, condemnation, or at least concern, so that's enough -- and so if that's the case, would that be enough then for the discriminatory motive of the original enactment if I were to find that there was discriminatory motive with the original enactment applied to the later reenactment?

In other words, what would the 1952 Congress have to do to cleanse the law from its former racial animus?

MS. GORMAN: I think the answer to that stems largely from Supreme Court dicta, and it's not just those two cases. I also wanted to address some of the cases that the government cited regarding reenactment.

But I think a short answer to your question is yes. If you have -- you have an obligation as a legislator, as a lawmaker, to understand the laws that you are enforcing.

The 1929 law was clearly motivated by racial animus. A decision to reenact it silently is exactly the --

is the greatest danger of reenactments, and it's the greatest danger of the government's position that they allow racist legislation to survive while allowing courts, to the extent they are willing to, to ignore the language that actually makes it challengeable.

And, as I said before, it's easier to tweak a law, it's easier to reenact a law that's already on the books than to introduce brand-new legislation and to explain why the brand-new legislation needs to exist.

But their silence I think speaks volumes because that Congressional Record is not a secret, it is in there, it is incumbent on them to know that legislation and to understand its origins and its roots.

And if the Court finds that racial animus pervaded and was one of the causes of the 1929 statute and they kept that law in place -- 1952 essentially reorganized a large amount of criminal laws, but it didn't really touch -- it didn't touch 1325 and 1326.

And so -- and I do want to address actually other cases regarding reenactment, but what I also want to touch on is I agree to some extent with this Court's comment that the fact that 1326 has been prosecuted in ways that I think we would find shocking and unacceptable if -- let's say this was a white man charged with fraud, you would never see this kind of hearing.

But it has become so deeply ingrained in our culture, this anti-immigrant sentiment, that we largely do not question the fact that 1326 is actually treated in different ways than other statutes.

And while I agree that it affects disparate impact, the *Arlington Heights* factors were nonexhaustive, so if we are challenging legislation, and if one of the questions is whether we can infer the racial animus in the 1929 law to the law as it exists today, I think one of the factors that would be permissible for the Court to consider is how it is treated and what due process protections are afforded to migrants.

And I don't think it can escape scrutiny that, particularly in the past four years there has been an obsessive and a true obsession with the criminalization of migration to the extent that it is -- I think the most -- 1325 and 1326 are combined the most prosecuted offenses in the United States.

And theoretically the United States Government is here to actually promote public safety, but the fact that we are exclusively focusing on migrants of the southern border I think says something about what we as a society and culture, and I think it can be inferred from the legislative silence, are willing to permit.

It's no longer acceptable to talk about mongrels

and eugenics and breeding horses, all of which are actually part of the legislative record, but it's very easy to replace those with race neutral words like alien or criminal alien, but it comes from the same place.

And I don't think you can separate the racial animus that resulted and the fact that this is the law, that it is illegal, after you are deported and you are reentered, that you are prosecuted for a felony.

I don't think you can separate that from today, especially when there has been an absolute refusal to acknowledge it. And that's even apparent in the government's response where it wouldn't even acknowledge that this talk about eugenics, which is in the Congressional Record, is racist. We can't even agree on that point.

And if we can't agree that the 1929 statute was motivated by racial animus, I think then there is two very different ideas about what racial animus is, but I would argue that eugenics certainly fits the bill.

And whether you want to call it aliens or criminal aliens or that we should dedicate all of our enforcement efforts to the southern border, it is hard to escape that racial animus continues to pervade this law.

Another interesting fact was in 1952 I learned that there was one Latino congressperson in total in the entire congressional body that essentially recodified 1325 and

1326.

But I think under Supreme Court dicta, which this Court must afford great weight, if a policy is traceable to -- in that case it was segregation -- then -- and it has discriminatory effect, it offends the Equal Protection clause.

That language applies with equal force to racism as Justice Sotomayor stated so eloquently in *Ramos v Louisiana*.

But with respect to the reenactments, I also do want to address some of the cases the government cited to argue that reenactments, even if they don't reckon with or talk about the racist origin of the law, are sufficient to cleanse it.

So one of the cases primarily relied on the government was *Mobile v Bolden*, and I'll cite it as 446 U.S. 55, and the government cited at 74. This is a 1980 Supreme Court case.

And it specifically says asking whether discriminatory intent has been proved as to the particular enactment at issue because,

> "...past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."

So I think what's important to note about this case is that that case was first superseded by statute, by

Section 2 of the Voting Rights Act, but it was also rejected in substance by the Supreme Court in *Rogers v Lodge* which I touched upon in my reply.

But *Rogers v Lodge* actually went further, and it went so far as to reject systems that are neutral in origin but have been subverted in invidious purposes.

And, for context, that was a decision where the Court held that an at-large system election in Burke County violated Equal Protection, and the Court held that there was sufficient evidence that the at-large system was operated as a device to further racial discrimination, and that there was extensive historical evidence that the county had impeded political participation of black citizens, and it ultimately upheld a system of single-member district established by the district court.

And that was two years after *Mobile v Bolden*.

And probably more relevant to this case is the Court said that,

> **"Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced**

by laws and practices which, though neutral on their face, serve to maintain the status quo."

And the pin cite to that is 625.

The Court went on to discuss ***Arlington Heights*** and ***Washington v Davis***.

I think particularly that the government relied so heavily on ***Mobile v Bolden*** that it's important to understand that the Court repudiated that logic and reasoning, not just because it was superceded by statute, but also in substance.

And I'll also say the government misrepresents the holding in ***Abbott v Perez*** where the Court explained that the presumption of legislative of good faith is not changed by finding of past discrimination.

But that's actually not what ***Abbott v Perez*** was about, and it supports Mr. Carrillo-Lopez, because in that case the Court ultimately -- the sort of challenged statute was a 2011 predecessor statute to a 2013 one.

And so the Court specifically said, well, the 2013 legislature didn't reenact the plan previously passed by its 2011 predecessor, and it relied on that in upholding this 2013 law.

But I don't think you can cite that case to say that reenactments are sufficient to cleanse a law, particularly if they fail to reckon entirely with the racial

animus that is responsible for this law existing in the first case.

THE COURT: So --

MS. GORMAN: I'm sorry, your Honor.

THE COURT: I'm sorry, were you finished with your argument relating to reenactment?

MS. GORMAN: I was, your Honor.

THE COURT: You offer in the first supplement a decision -- this is ECF 31 -- from the Southern District of California where that Court, well, rejected and denied the motion to dismiss challenging Section 1325, and there the District Court ultimately found that the subsequent reenactment of the statute cleansed it of its discriminatory animus.

Why shouldn't I find that analysis persuasive with respect to Section 1326 here?

MS. GORMAN: So I largely provided the Court that to -- so, A, I don't agree with the Court's ultimate conclusion, and ultimately the Ninth Circuit will have to decide that issue.

But the Court was able to sort of accept that the racial animus pervaded it, accept, as this Court did, the *Arlington* factors.

But specifically that individual was charged with attempt which wasn't even part of the statutory stream in

any way until 1990.

So in contrast, 1326 is substantively the same making it a felony for somebody who has been previously deported/removed, when they come back to this country, to then be convicted of a felony.

And so the Court -- I don't necessarily agree that the attempt gives it an out because I think 1325 is similarly animated by the same racial discrimination as 1326.

But I do think that part of that Court's holding is important, which is that *Arlington Heights* does apply because the government's primary -- and so while I disagree with the holding, and I don't think the fact that it's -- the fact that attempt was introduced in 1990 necessarily changes anything because ultimately it's an attempt to do -- to commit a 1325.

But at the end of the day I do think what is fundamentally important about that decision and why it was worthy of mentioning -- so the government's main argument is that when we're talking about immigration law, and the Court has said that in order to enforce immigration law the government may use criminal statutes.

It differentiates that from the argument that *Arlington Heights* applies when racial animus is the motivating factor, and that the fact that a law is ostensibly to regulate immigration can't -- does not permit racist laws to exist

particularly in the context of criminal law, and so that, at least, part of the holding I think is relatively important.

THE COURT: All right. Thank you.

MS. GORMAN: But, no, I do not -- I obviously do not agree with the holding that the fact that this person who was prosecuted under attempt which was introduced for the first time in 1990 would be enough to cleanse it.

So I think this case is distinguishable both on the statute itself, because the statute is essentially the same statute. We're not dealing with an attempt statute, and I think that was an easy out for that Court.

But with 1326 we essentially have the same statute other than harsher and harsher and harsher penalties, and -- I'd note.

So at least I hope that clarifies why I think that supplement was important even though I understand that it doesn't fully support this position, I think it's distinguishable both on its facts and its reasoning.

THE COURT: So if I were to agree with the defendant and grant the motion, what would be the effect? It would -- because a challenge here in a way, it's kind of an as-applied challenge to those who are of Mexican citizenship. And so would the statute be unconstitutional as applied to this defendant and perhaps maybe extends to any defendant who is of Mexican citizenship?

I was just thinking of what the -- the theory that's being brought here and the impact if I were to grant the motion, not that that's --

MS. GORMAN: So my understanding is that the --

THE COURT: -- that important.

MS. GORMAN: My understanding is that the impact of this case would be that the indictment against Mr. Carrillo-Lopez would be dismissed, and ultimately this -- the various holdings of various courts will ultimately percolate up to the Ninth Circuit, ultimately to the Supreme Court, and that will ultimately decide whether this statute can stand notwithstanding the racial animus from 1929.

But at least in terms of the direct impact, the indictment against Mr. Carrillo-Lopez would be dismissed, and I -- you know, I added a section about Mr. Carrillo-Lopez, though this is not a challenge that is sort of particular to him, because I think in some very deep ways this case sort of demonstrates how untethered this hatred of migrants has become from any rational public safety rationale and any rational sort of immigration issue.

Mr. Carrillo-Lopez is serving a life sentence for a nonviolent drug offense, and yet it -- and yet the decision is that if he somehow manages to, I guess, get paroled before he dies, then he should still be criminally prosecuted and sentenced to federal prison in spite of the

fact that he is already being punished so incredibly severely.

And I think this case in some ways sort of illustrates that animus, but while it's not part of the actual underlying legal argument, A, I think it's important for his name to be part of this record as he is a human being and the history of this legislation has so deeply dehumanized migrants that to actually say that he is a human being with a name, that he is a person, was just important for both the record and just out of respect and to honor Mr. Carrillo's humanity at the end of the day, but I think the result of this Court's decision would be the dismissal of the indictment against him.

And ultimately these challenges will percolate up, and whether or not that statute ultimately fails will not be as a necessary result of this Court's ruling, but as this country sort of grapples with the racial animus in general, and as we -- I mean, this country is already grappling with racial animus in the statute.

One of the sections that I cited -- I don't mean to be all over the map, your Honor, was that in 2019, in December 2019, Congressman Garcia introduced legislation which now has 44 co-sponsors recognizing that 1326 and 1325 prosecutions, but for the purposes of this case 1326, have a racist origin, and if we truly want to eradicate racism, then those laws must be repealed.

And by the time you have a piece of legislation

and a contemporary Congressional Record openly acknowledging the racial animus of a law, I honestly think the writing is on the table, that I hope my children and my children's children will not see this law, that the word alien or criminal alien, race neutral though they may be, will be recognized for the racist dog whistles that they are.

But I think whether that starts with this Court and Mr. Carrillo-Lopez, or whether it percolates into these other courts, I do think that at the end of the day this statute will not stand, and that the racial history has to be reckoned with if we're going to have an intellectually honest and morally honest jurisprudence, and I think the 2020 Supreme Court --

THE CLERK: Your Honor, Ms. Gorman had indicated she was having problems with her Internet connection this morning, and I believe that she will be joining us in just a minute via her cell phone. I'll send her a message.

THE COURT: I think -- Ms. Gorman, your screen froze when you referenced -- I think you ended with "I think the 2020 Supreme Court," and then you cut off.

MS. GORMAN: So the 20 -- those two decisions in the Supreme Court --

THE COURT: You are talking about *Ramos* and *Espinoza*?

MS. GORMAN: Yes.

The recognition that we have to grapple with legislative histories of racially -- of racist laws is important, and Supreme Court dicta has to be afforded great deference just under the law.

And by the time the Supreme Court is openly acknowledging, and we are having uncomfortable conversations about the history of pieces of legislation or, in *Ramos'* case, nonunanimous juries in Louisiana, that there is a broader recognition that racism is intolerable, and whether it comes in the form of race neutral statutes that are aggressively prosecuted against migrants in the southern border without discretion to the United States Attorneys, or whether we're talking about nonunanimous juries in Louisiana, that we can't escape that history if we are going to actually cleanse our jurisprudence of racism which I think -- I hope everybody agrees is wrong morally and legally and that the Equal Protection clause doesn't tolerate it.

THE COURT: But those two decisions don't involve Equal Protection or even the *Arlington Heights* analysis, do they?

MS. GORMAN: They do not.

It was Justice Sotomayor's reference in *Ramos* that specifically was the dicta that while -- A, would stand, I believe, for the general proposition that when you are evaluating the constitutionality of a law that you look beyond

its reenactments.

And I think that's particularly important because reenactments are so incredibly effective and powerful. They allow you to accept racism by your silence. And so if we were to accept the proposition that a reenactment of a law, no matter how motivated it was by eugenical zeal, and just accept that silence on the issue is sufficient to cleanse it, that that would not honor the Constitution's commitment to racially neutral law.

And so those two cases both stand for that general principle that you have to -- that you can look and you have to actually look beyond reenactments and codifications, especially in this case when you're dealing with a law that has essentially remained the same.

But specifically Justice Sotomayor actually talked about the Equal Protection clause. It wasn't an Equal Protection clause challenge, but she felt it necessary to say, look, if this was an Equal Protection clause challenge, this would offend that, too.

And so when I talk about Supreme Court dicta, I talk both about the general principle that when we analyze the constitutionality of a statute, we can't let a reenactment that never reckoned with the racist reasons for a law's existence to cleanse it of that animus, but also specifically Justice Sotomayor's comments and concurrence in *Ramos*.

THE COURT: All right. Thank you, Ms. Gorman.

Mr. Walkingshaw?

MR. WALKINGSHAW: Thank you, your Honor.

And I'll try and keep my comments as narrowly focused on the legal issues before the Court as possible, and if at any point the Court has any questions, please feel free to interrupt me.

But I think I need to begin accepting the Court's premise that we'll proceed on the *Arlington Heights* framework.

The defendant's motion is premised entirely on the proposition that the portions of *Ramos* and *Espinoza* that we were just discussing establish a freestanding principle that a -- that reaching back into the history of subject matter -- subject areas of law can be a valid basis to invalidate later enactments. That simply is not what those cases stand for.

So in *Ramos*, the discussion of the law's history falls within a repudiation of a functional analysis of the Sixth Amendment right to a jury trial.

In a majority opinion, the -- Justice Gorsuch's opinion took up the functional analysis in a precedent that it was overruling, which is the *Apodaca* case, and it said that basically the -- the functional analysis done in *Apodaca* focused on, you know, whether or not it would reduce the

likelihood of hung juries.

And the quote from the majority opinion is who can profess confidence in such a breezy functional analysis, a breezy cost benefit analysis such as that.

And it went on to discuss that the functional analysis taken up there was not only faulty in the -- in its execution, and that's where the discussion of the law's history comes in and says that it failed to take into account the fact that it was essentially adopted originally to disenfranchise African-American jurors.

It says that our problem with this analysis is not that it's, quote, skimpy, but that it was done at all.

Ultimately the *Ramos* case hinged entirely upon what the Sixth Amendment right to a jury trial meant, and what the Court concluded was that meant at common law and at the adoption of the Constitution that the Sixth Amendment right included a right to a unanimous jury.

Now, there was a dissent by Justice Alito that took issue with this analysis, but the point of agreement between the majority and the dissent in that case was what does that history have to do with the holding in that case? Nothing.

THE COURT: What about -- Ms. Gorman is pointing out to Justice Alito's concurrence in *Espinoza* which suggests that the original motivation of the laws do matter.

MR. WALKINGSHAW: Well, your Honor --

THE COURT: In fact, she quoted the statement from his concurrence that, if I quote,

"If the original motivation for the laws mattered there," i.e., in *Ramos*, "it certainly matters here."

MR. WALKINGSHAW: Yes, your Honor.

And I think it's extremely important to note there that that was a solo concurrence joined by no other justices. It's crucial to note that while Justice Alito objected to the discussion in *Ramos*, he brought forth a similar analysis in *Espinoza*, and no other justice joined him. It's just clearly not the law of the Supreme Court. Justice Sotomayor was the only one to take up that -- that argument at all that's in the dicta discussed in the defendant's brief.

But at the end of the day the Supreme Court has said time and time again, as have other federal courts, that when you conduct an *Arlington Heights* analysis, you look at the motives behind the government officials taking the challenged action.

And I'll turn briefly -- well, I think perhaps the most recent and definitive statement on whether or not this theory holds water would actually be --

THE COURT: So if -- I want to follow up on what you just said.

If I accept that you look at the motive of the challenged action, does that mean that -- in a way it seems circular. So every time there's a reenactment, the Court has to ignore any legislative history relating to the prior enactment?

MR. WALKINGSHAW: Your Honor --

THE COURT: In other words, does a reenactment automatically cleanse any racial animus that animated from the earlier enactment?

MR. WALKINGSHAW: Well, your Honor, I think the important thing is to look at the people taking the decision.

So the DHS provision -- I think the clearest statement on this issue is that statements that are, quote, remote in time and context are not probative.

And in the *Department of Homeland Security versus Regents of California* decision, the Supreme Court said very clearly that statements by the president, President Donald Trump, before and after election, and the president became the head of the executive, that his statements regarding the DACA program were not probative of the issue of whether or not the determination to terminate DACA was motivated by racial animus, and that's -- that's a difference of less than two years.

I think the important thing here --

THE COURT: Well, isn't context important?

Because in the 1326 context, as Ms. Gorman argues, the subsequent reenactment merely adds additional punitive -- really made the violation more punitive.

MR. WALKINGSHAW: So, your Honor, I wouldn't agree with that characterization.

THE COURT: Why not?

MR. WALKINGSHAW: Subsequent amendments did add -- subsequent amendments did add additional penalties such as raising crimes, but they were part of larger immigration reform bills.

And the fact that they were reenacted doesn't -- they still go through the process of bicameralism at presentment. Again, the fact it might not have been discussed extensively on the Senate or House floor doesn't mean that they're not reviewed by congressional aides, that the congressmen don't read the bill.

There's a -- I think the Court can appreciate that the process of passing a law through Congress is not a simple pro forma act, and, moreover, in the subsequent amendments to the legislation, the 1965 revision we discuss in our papers, was concerned with racial -- was concerned with nationality quotas.

I believe the amendment in 1990 introduced a temporary protective status which primarily benefitted citizens from El Salvador allowing them to come into the

country and maintain a permanent status due to strife there.

The fact of the matter is that when these -- when these laws are reenacted, they go through a process, and the courts have been very clear, it's not for the courts to somehow create some disabling mechanism for the democratic process, that if the -- if congressmen don't specifically identify past instances of the law and the motives behind them, that they're somehow disabled from passing them in the future.

It's been very clear -- the Supreme Court has been very clear that past discrimination does not carry forward from one legislature to another in the manner of original sin.

Ms. Gorman discussed the *Abbott versus Perez* case. I think it's very instructive in that the Supreme Court upheld a voting plan that was explicitly based on a voting plan that had been adopted by the Texas legislature two years prior and had been found by the Supreme Court to be discriminatory and a violation of the Equal Protection clause and of the Voting Rights Act, and the Court said ultimately you need to look at the -- you need to look at the motives behind the people adopting the legislation and that good faith is presumed.

When Americans send legislators to enact their policy preferences, we have to presume that they're -- that

they're moving -- that they're moving forward in good faith, and statements taken from 20 years removed when not a single legislator from the 1929 Congress participated in the 1952 act, in the passage of the 1952 act, we simply can't assume that any racial animus or bias was imported through time into those legislators. You have to look at their --

THE COURT: What was the difference between the 1929 act and the 1952 reenactment other than making the law more punitive? What were the changes?

MR. WALKINGSHAW: So with respect to 1326 specifically, your Honor, or generally, or the revisions to the overall immigration framework?

THE COURT: With respect to 1326.

MR. WALKINGSHAW: The law is the same.

And, your Honor, I think that's not terribly surprising, given the fact that courts have said time and time again, I think *Hernandez-Guerrero* cited in our papers, that it's an essential part of any immigration framework to have a deterrent to enforce the judgments and the determinations of the political branches with respect to immigration. If there's no penalty for violating Congressional determinations regarding immigration or executive determinations regarding immigration, then it's, quote, all bark and no bite.

I think the statute has been updated subsequently, but there's never been, subsequent to 1929, and

defense points to no evidence whatsoever in the Congressional Record from 1952 forward, that creating this deterrent that allows for the enforcement of immigration law was motivated or driven by animus even when the deterrent value was increased.

THE COURT: So it seems, as I understand it, the government's position is a subsequent reenactment, and specifically here, the 1952 reenactment, would essentially cleanse any racial animus that stems from the 1929 enactment?

MR. WALKINGSHAW: Yes, your Honor.

You know, I'm not really sure -- I guess what I would say is I'm not sure that the framing of cleansing it is necessarily --

THE COURT: How would you frame it?

MR. WALKINGSHAW: Well, I'd frame it, we look to the decision of the 1952 Congress in passing this law as to whether or not they had a discriminatory motive, and there's no evidence that they did.

So, you know, there are a number of different ways you can think about it, but ultimately statements from more than 20 years prior don't forever taint the subject matter of the law that was passed.

There's no -- there's no basis in the law to create the sort of disabling mechanism that will prevent future generations from neutrally considering the sort of political considerations of public policy that Congress needs

to have the power to enact.

THE COURT: Do you agree that the defendant has offered sufficient evidence that the 1929 enactment was motivated by discriminatory animus?

MR. WALKINGSHAW: Your Honor, I think the initial -- the initial hurdle on the consideration, was it motivated in part by animus, I think we go into this a little bit in our papers, it's a very difficult thing to take the motivation of an entire legislative body out of a few handful of congressmen.

Obviously, the statements that were made were --

THE COURT: Well, under *Arlington Heights* they just have to show that discriminatory intent was a motivating factor.

MR. WALKINGSHAW: Yes. And, your Honor, I would say that the factor -- the statements here -- I'm sorry, I'm feeding back and I've lost -- your Honor, can you still hear me?

THE COURT: Yes.

MR. WALKINGSHAW: I beg your pardon. For some reason the screen changed.

The statements offered here are deplorable, and the government certainly would not say that they don't demonstrate racial animus on the part of those few congressmen.

We would certainly dispute that the law would not have been passed absent -- absent the racial animus, but ultimately that consideration just isn't relevant to the determination of whether or not the 1952 -- the Congressional legislators that had -- that passed the 1952 Immigration and Nationality Act, whether or not they had any racial animus in passing the law that they passed. There's no dispute that that's the operative framework at place here, your Honor.

THE COURT: So just so I'm clear, the government does not concede that the evidence offered is sufficient for the Court to find that the 1929 enactment demonstrates discriminatory intent under the *Arlington Heights* standard?

MR. WALKINGSHAW: I mean, ultimately, your Honor, I think the question is so far removed from the relevant one. I would say that, yes, the statements from those legislators would be sufficient were we considering the 1929 law, but we're not.

THE COURT: I understand we're not. I just -- the first step -- well, the defendant's argument stems from several steps, so I first have to find -- because they're relying on the 1929 enactment, the legislative history of the 1929 enactment of the statute, to argue that the -- to demonstrate discriminatory intent.

So you agree that they've offered enough evidence to demonstrate that the 1929 enactment stems from

racial animus under *Arlington Heights*.

MR. WALKINGSHAW: Yes, your Honor.

THE COURT: And I assume the argument is that shouldn't carry over to the 1952 reenactment; is that right?

MR. WALKINGSHAW: Yes, your Honor. Yes, that's been -- that's been -- ultimately the *Arlington Heights* analysis is not informed by those statements from more than 20 years prior to the law's passage.

Every Court that has considered this motion, and several have, that has applied the *Arlington Heights* framework, has come to the same conclusion.

THE COURT: I'm sorry, what was your statement? Every decision what?

MR. WALKINGSHAW: So every Court that has considered -- as I believe Ms. Gorman referred to earlier, these motions making this argument have been filed in several courts around the country. They're cited in our papers. Ms. Gorman cited one in one of her supplements.

Every Court to consider the issue of whether or not the statements in 1929 were sufficient to meet the initial burden for later enactments of the criminal immigration law, every Court has found that the showing of those statements in 1929 is insufficient to show that the later enactments were driven by discriminatory motive because they don't speak to the motives of the people making the decisions that were

contested.

THE COURT: Other than the supplement -- the decision from the Southern District of California that Ms. Gorman offered in the first supplement, I don't recall the government citing to any other decision in their response. If you can just point out the pages in the response.

MR. WALKINGSHAW: Yes, certainly, your Honor.

So we attached one as an Exhibit A that's from the Eastern District of Virginia, and I believe it's also cited in -- it's cited in our papers --

THE COURT: Oh, I think I remember that. I remember that. Thank you.

MR. WALKINGSHAW: And then further there were other decisions from the Southern District of California, I believe it's been litigated a number of times.

I believe on page 22, in footnote 13, the -- although I believe that was like the -- like the case cited in the supplement by Ms. Gorman, this was the challenge to 1325 and not 1326. It similarly rejected the premise that laws validly passed by the people's delegated representatives decades after racist statements were made can be invalidated based on a history that the country may not even be aware of.

THE COURT: If I were to find that the defendant has met his burden, the burden shifts to the government on *Arlington Heights*, and the government would have to show that

the statute would not have passed even without the impermissible purpose, do you think that the government has met that burden?

MR. WALKINGSHAW: Yes, your Honor. It's been passed over and over and over again -- oh, dear, I'm frozen again. Your Honor, can you hear me?

THE COURT: I can hear you.

MR. WALKINGSHAW: Yes. So, your Honor, we think -- I apologize. This is the most stable Internet connection I'm able to (inaudible).

But, again, this law has been passed over and over and over again. The 1952 Congress explicitly disclaimed any theory of racial superiority or Nordic superiority.

The 1965 Congress, which was in the throes of the civil rights movement, explicitly -- they eliminated nationality quotas.

Over and over again Congress has modified, you know, altered, reconsidered, and repassed immigration legislation, and in no Congress subsequent to 1929 has -- is there any indication that any of those decisions were driven by racial animus.

THE COURT: I guess -- so what I'm struggling with --

MR. WALKINGSHAW: It's merely -- it's merely alleged as something --

THE COURT: Mr. Walkingshaw, I'm trying to process the argument that the fact of the subsequent reenactment itself is sufficient for the government to meet its burden that the law would have passed even without the impermissible purpose, it seems to eviscerate the government's burden because any subsequent reenactment would allow the government to meet its burden.

MR. WALKINGSHAW: Well, your Honor, I think, again, the Court needs to look at the motivations of the people making the decision, and so if there's evidence of racial animus in subsequent enactments, then certainly that's problematic.

But here there's simply no evidence of racial animus from 1952 forward. It's entirely premised on statements more than two decades prior -- the defense motion is entirely premised on statements made more than two decades prior to the passage of the operative legislative framework.

THE COURT: Was there any testimony, any legislative history showing one way or another whether or not there's discriminatory animus with the 1952 enactment?

MR. WALKINGSHAW: I believe in Ms. Gorman's supplement she noted -- the passage was -- the -- those provisions were not discussed on the Senate floor or the House floor.

But, again, your Honor, it flips the burden

which is -- which is a -- which is what the Court recognized in *Mobile* and in *Abbott versus Perez*.

THE COURT: I thought you said that Congress disclaimed any racial animus in the 1952 enactment that was passed.

MR. WALKINGSHAW: Oh, I'm sorry, that is true, your Honor. I beg your pardon.

So the -- there was -- there was discussion of -- of -- yeah, of disclaiming any theory of racial superiority. This is actually in our papers in the discussion of the legislative history of the 1952 act.

But I'm not sure that that was specific to -- I mean, I'm not sure that it was necessarily specific to the 1325 -- 1325 hadn't been enacted yet, but the illegal reentry provision, but, again, your Honor, I don't think it needs to be. I mean, there's really -- there's really no evidence of anything but legislative good faith in the 1952 act.

THE COURT: So it wasn't specific to 1326 because there's no reference to 1326.

MR. WALKINGSHAW: Yes. But, again, your Honor, the -- the overall view and goal of that Congress was to disclaim any theory of racial or Nordic superiority.

THE COURT: I'm sorry, you said the overall goal of the enactment of the statute was to -- for the purpose of disclaiming any racial animus?

MR. WALKINGSHAW: I beg your pardon, your Honor, that's perhaps a bit of an overstatement.

But it's clear from the legislative history that in the enactments, to the extent that the -- to the extent that -- that race -- that Congress people that discussed the issue disclaimed the theory of Nordic superiority.

THE COURT: So to the extent it was discussed, they disclaimed any racial animus. It wasn't what you said earlier --

MR. WALKINGSHAW: Yes.

THE COURT: -- that is, that the whole goal of the reenactment was for the purpose of disclaiming the prior discriminatory animus.

MR. WALKINGSHAW: Yeah. I beg your pardon, your Honor, that was an overstatement on my part. That was not what I meant to say.

THE COURT: Okay. So repeat again what you meant to say.

MR. WALKINGSHAW: Yes. Yeah. That would not be accurate.

Yes. Yeah. All I mean to say is that to the extent that race was discussed, the Congress repudiated theories of racial superiority and continue to do so going forward.

In 1965, the height of the civil rights

movement, it eliminated quotas for -- regarding national origin.

Again, in 1990, Senator Kennedy, Ted Kennedy of Massachusetts, introduced elements into the immigration framework to offer temporary protective status that primarily benefitted individuals from Latin American countries.

So to say that this sort of -- it's just simply not an appropriate framework to judge a law to say that in 1929 this sort of racist seed or taint was planted that runs forever throughout unless it's specifically identified and disclaimed is just alien to anything in the law in this area.

THE COURT: What's the government's position on an evidentiary hearing?

MR. WALKINGSHAW: Again, your Honor, I strongly believe it would be unnecessary, that the precedents we've cited and some of the precedents that were cited by the defendants, including *Department of Homeland Security versus the Regents of the University of California* in which the Court decided it didn't need to determine what the appropriate framework was to judge the termination of DACA, even if we apply *Arlington Heights*, the -- even if we apply *Arlington Heights*, the plaintiffs can't say the claim because the statements were remote in time and separate context.

So even -- even assuming for purposes of argument that the 1929 law was entirely driven by racial

animus, which we don't concede, we think there are valid reasons for passing this law, as we've discussed, to establish a deterrence, to prevent or to enforce Congress's immigration mandates, nonetheless, the appropriate -- even when prior discrimination has been found, the appropriate source of inquiry is 1952, and no evidence to that effect has been produced by the defense.

THE COURT: Well, but you mentioned earlier that to the extent that race was discussed with the 1952 reenactment, that Congress repudiated any racial animus and that they did that going forward with every reenactment. Doesn't that warrant --

MR. WALKINGSHAW: Yes, your Honor.

THE COURT: -- some kind of evidentiary hearing on that issue when the defendant's position is there was no such evidence?

MR. WALKINGSHAW: I don't -- well, your Honor, I think all of these things are -- all of these are subject to the Congressional Record and are matters of public notice, so they're the sort of things the Court can review.

But, again, while we certainly agree -- while -- the government's position is certainly that if the Court looks to subsequent enactments, it would find good faith and find that would be -- that 1326 would be passed absent any -- absent any racial animus.

The fact is that it was passed initially in 1952 in the absence of any racial animus, and that passage is what the Court should focus its inquiry on, and no evidence has been put forward to suggest that the motivations of those legislators were driven in any way by racial animus.

THE COURT: Thank you. Anything else, Mr. Walkingshaw?

MR. WALKINGSHAW: Not unless the Court has any further questions, your Honor.

MS. GORMAN: Your Honor, may I briefly respond?

THE COURT: Yes.

MS. GORMAN: Thank you.

So, first of all, I think the Court highlighted why it is so important to have a historian come and talk about this legislation, particularly as the government focuses on the 1952 reenactment which it concedes contains no discussion and simply adopted and reinforced the 1929 statute.

And one thing I read into the record was Truman's veto, and why I highlight part of the reason why he vetoed it is because it was a continuation of the national origins quota, and it -- what it did end in terms of race, I think its only acknowledgment of race, was that it ended race-based exclusions of Asians and exchanged it for small quotas on them, but it continued the highly restrictive and very controversial national origins system and its privileged

entry by highly-skilled immigrants.

And to the extent the government wants to rely on this 1952 reenactment, which is absolutely silent as to 1325 and 1326, I also want to note for the record, in addition to the importance of having an evidentiary hearing and having a historical scholar actually testify about the context of the legislative history is -- for example, in 1954, and this is after the 1952 act, that was Operation Wetback, and that was pursuant to this piece of legislation.

I think Operation Wetback -- I don't think that there's any sort of disagreement that in 1954 and today it's very clear that wetback refers to Mexicans, and that was following something that the government talked about in its briefing, the Bercerra program, where the United States essentially permitted illegal immigrants to come in and to essentially do agricultural work, and then there was a backlash against it where you have Operation Wetback, again in 1954, which decided to repatriate Mexicans, including Mexican [sic] citizens. So pursuant to that over a million Mexicans, including American citizens, were deported to Mexico.

So the idea that 1952 was somehow -- that we were living in a postracial world, when there's one Latino congressman who was even in Congress at all in 1952, I think is -- it sort of exemplifies that this new law's racist origin, of course, continued from 1925, and it's the silence

on that history that allows these racially invidious laws to continue.

I mean, and so I think the Court sort of makes or agrees with the main point that if we take the government at its word that any reenactment essentially cleanses legislation, no matter of how racist, no matter how eugenical, no matter how despicable to at least our stated race-neutral values, then we would never be able to challenge on Equal Protection grounds laws as racist as this one.

And one important thing that the government does not dispute, I would highly dispute that 1952 represented a repudiation of anything racist, but I think the silence of the 1952 legislature and its willingness to adopt in whole a statute that is clearly derivative of eugenical concerns sort of makes its own point, that we can't use reenactments to cleanse laws, particularly if they refuse to even acknowledge that eugenics is racist.

And if you -- it is incumbent on every legislator who passes a law to understand the legislation that they are passing, and we have to infer from the fact that they were willing to reenact 1326, or recodify 1326 in the same form as 1929, unless -- I mean, it adopts also the reasoning of the prior legislature, it doesn't cleanse it, it doubles down on it, and -- pardon me, your Honor.

THE COURT: Do you want to address the cases

that Mr. Walkingshaw cites to, including the *Regents of the University of California* and his reference to DACA in terms of reenactment in terms of what the Court can consider?

MS. GORMAN: And I want to at least make sure that I am addressing the right cases.

As I understand it, the DACA decision accepted the *Arlington Heights* framework but rejected the comments of Donald Trump in striking it down, but I also want to make sure that I'm talking about the correct case.

So if the Court of would be so generous as to provide a citation, I can, of course, address it.

THE COURT: I think you at least summarized the argument, as I understand it from Mr. Walkingshaw, the case is *Department of Homeland Security versus Regents of the University of California*, 140 Supreme Court 1891. It was issued -- the decision was issued June 18, 2020.

MS. GORMAN: Court's indulgence, your Honor. I just want to make sure that -- because I know that when the government initially contextualized that was with respect to whether *Arlington Heights* applies at all, so that is where I focused my arguments, so I want to make sure that I am responding to something relevant in what the Court is saying or in what the government's argument is.

THE COURT: I can also have Peggie email you the case if you aren't able to pull it up.

MS. GORMAN: I'm able to pull it up, your Honor.

MR. WALKINGSHAW: And, your Honor, once Ms. Gorman is done reviewing the case and responding, if I could have a brief bit of time to respond as well, I would appreciate it.

(Proceedings paused.)

MS. GORMAN: Your Honor, at least as I understand it, while it was rejected on its fact, the DACA decision in *Homeland Security v Regents of the University California* partially supports this claim because it wasn't distinguished on the facts.

So one of the -- the Court states to plead animus, the plaintiff must raise a possible inference that this invidious discriminatory purpose was a motivating factor in the relevant decision, which I believe that we have shown in this case particularly as the 1952 legislative session simply adopted the 1929 law.

And so they did not have the kind of evidence that we have in this case which is this lengthy history that precedes the 1929 enactment, including the legislative history which is in the record.

So whether or not -- and this case was ultimately distinguishable on its facts and whether or not Donald Trump or the ultimate recission memo, or whether Donald Trump's comments were relevant to the recission memo, these

are relatively factually nuanced distinctions.

But at the end of the day I think this DACA decision actually does support at least the general principle that if you can point to the racial animus as a motivating factor in a decision, and in this case we're referring to a statute, that *Arlington Heights* applies.

THE COURT: If I were to -- so since the government has already conceded that the 1929 enactment stems from discriminatory animus, what would be the purpose of the evidentiary hearing?

MS. GORMAN: So if the government's contention is that in 1952 that the entire purpose of the law was to disclaim racial animus, I -- I think that any sort of historian would happily rebut that.

And, in particular, one of the two historians that we propose testify at an evidentiary hearing is Professor Hernandez. She's an endowed chair at UCLA and has studied the topic in depth.

And this topic has actually been subjected to a lot of academic analysis, and there are multiple academics that we can bring to testify in front of this Court.

One thing that I think the government does not dispute was that in 1952 there was -- they simply decided to carry forward the 1929 law, and the 1929 legislature was clearly motivated by racial animus which satisfies *Arlington*

Heights.

So this reliance on a reenactment that the Ninth Circuit has explicitly recognized never reckoned at all with the racial motivations for the law is simply insufficient to cleanse it.

To the extent that the Court has broader questions about this 1952 legislation and whether it could possibly cleanse the racial animus that was the reason for the passage of this law, then I think testimony from a historian is important to contextualize it.

I mean, there's a reason why President Truman vetoed this law, and it was particularly this relatively controversial national origins part of the 1929 legislation.

But in 1952 they essentially reorganized and made some modifications to a large host of immigration statutes, and the one that they chose to leave untouched was the criminalization of migration, and that was for a very specific reason, and we see that post 1952.

I mean, the idea that in 1952 we were living in a world without racism I think is ridiculous. I pointed out before in 1954 we decided to repatriate Mexicans in Operation Wetback.

So if we really want to say that the 1952 legislature, while adopting this law in whole cloth was a repudiation of racism, I think that that is undermined by the

historical record, and it would be illuminating to have the testimony of a historian, particularly one who is so well steeped in this legislative history.

THE COURT: And so is that individual Professor Hernandez?

MS. GORMAN: Yes. There's also Professor O'Brien who offered to testify. I don't believe he submitted a declaration in connection with the motion.

But I have reached out to Professor Hernandez and Professor O'Brien who both expressed that they would happily come and speak to this Court.

I believe Mr. O'Brien -- or Professor O'Brien is a professor at UCSD and Professor Hernandez at UCLA, and both have written extensively on this topic.

This subject has actually been the subject of a lot of academic debate. I think the idea of looking at this law through an Equal Protection lens was probably precipitated by the 2019 introduction of the New Way Forward Act that explicitly recognized that 1929 -- that the origin of 1326 and 1325, which I recognize is not at issue here, but the 1326 at least has a racist origin that stems back from the '20s.

And the United States Attorney has proudly held up this hundred-year history. That was one of the reasons why I submitted the US Attorney Bulletin, that it's only when subjected to an Equal Protection analysis that the United

States Attorney wants to walk back this sort of proud endorsement of this hundred-year law.

But the fact is 1952 just carried it forward, and it is certainly not sufficient to cleanse it of its racial animus.

And we don't live in a race-blind world. We certainly didn't in 1952, and historically it has been the courts who have the courage to actually discuss and talk about these legislations and what they mean in the context of the Constitution.

I mean, 1952 was before *Brown V Board of Education*. So we're talking about -- you know, a world where -- you know, the segregated world where that was okay, and so the idea that 1952 somehow cleansed it because they didn't talk about it is, I think, ridiculous.

But I also think the historian might be helpful to shed additional light on it, particularly as that's the government's position.

THE COURT: All right. Thank you.

Mr. Walkingshaw?

MR. WALKINGSHAW: Your Honor, just a few points quickly, and I really don't know how it got to this point, but it is certainly not the government's position, nor is it the government's burden to prove that 1952 was free of racism.

It's the defendant's burden to prove that the

challenged action was driven by racism, and, in this case, no evidence has been offered.

The entirety of the declaration submitted in support of -- or by Professor Hernandez revolves around the 1929 law. The entirety of the defendant's briefing revolves around the 1929 law.

And Ms. Gorman's statement that there was a backlash in 1954 to the 1952 law, that several -- that a large number of Mexicans were repatriated as a backlash of the 1952 law, you know, certainly doesn't support the fact that the 1952 law was racist.

Again, the point of inquiry for this Court is not whether or not the world was free of racism in 1952, it certainly wasn't. It certainly -- racism is certainly something the Court should be concerned with --

THE COURT: It still isn't.

MR. WALKINGSHAW: -- something that anyone -- exactly. It's something that anyone interested in justice should be concerned with.

But the framework set forth by *Arlington Heights* requires a serious inquiry into whether the decision that was actually taken was driven by racism, and no evidence has been put forward to that effect.

And just very quickly, your Honor --

THE COURT: Well, I understand that the

government -- you want to start from the 1952 reenactment whereas the defendant's argument is the 1929 enactment, and the absence of any repudiation with the subsequent reenactment, should be considered by the Court.

So I understand the arguments. I think that's why -- the defendant is focused on 1929, and the government is focussing on all the subsequent reenactments going forward. Am I right?

MR. WALKINGSHAW: Although I would -- I would say, your Honor, the only -- the distinction I would make is it was a 1952 enactment so that it --

THE COURT: Yes, 1952.

MR. WALKINGSHAW: -- the immigration and nationality law, yes, is that it was an entirely new set of statutes, and that's the operative framework.

But, yes, that's the central point of our -- of our disagreement, I think, is that the 1929 law is 20 years removed from what this Court's point of inquiry should be.

THE COURT: Thank you. I cut you off. I didn't know if there was something else you wanted to mention, Mr. Walkingshaw.

MR. WALKINGSHAW: Just very briefly, your Honor, with respect to *Department of Homeland Security versus Regents,* again, that was actually a case that was cited in the defendant's papers, in their moving papers, and it was cited

for the proposition that I believe five justices thought that the Arlington Heights framework should apply. That's actually not true, your Honor.

If you look at the decision, it says that two alternative frameworks were proposed, and this actually wasn't one in which plenary deference that Congress's congressional authority was -- was advocated, that the government argued that -- that the claims brought forth by the plaintiffs were actually in effect a defense to deportation in the vein of selective prosecution.

When the Court cited -- and I'm quoting here, "We need not solve this debate because the Equal Protection claim fails on its merits."

And eight justices agreed on that point that the plaintiffs had not stated an Equal Protection claim.

So it's not correct to say that *Department of Homeland Security versus Regents* stands for the proposition that the *Arlington Heights* framework applies.

It was assumed for purpose of argument, because even taking the plaintiffs' standard of review at face value, even if adopting that standard, the claims would still fail.

Now, I understand the Court is proceeding on the assumption that the *Arlington Heights* framework applies here. I don't mean -- but I just wanted to be clear on what that case said.

THE COURT: Thank you.

Ms. Gorman, I just have one question for you with respect to the testimony that would be offered at the evidentiary hearing should I have one.

And it sounds like, based on the information presented in the motion, the two experts would just testify on the legislative history with the 1929 enactment and not the 1952 enactment; is that right?

MS. GORMAN: Your Honor, my understanding is that both historians would trace our current system of 1326 and 1325 prosecutions to the 1929 -- to the 1929 law and can contextualize any sort of subsequent reenactment which the government has already conceded in 1952 they were absolutely silent.

But my understanding is not just that they were saying that the 1929 law was animated by eugenics and ultimately resulted from a compromise between avowed eugenicists and a desire for cheap Mexican labor but the ways in which that law carried forward in subsequent reenactments.

So I do think that those historians would be important to the extent that the Court finds that the silence of the 1952 legislature is insufficient to show that it essentially adopted the racial animus of 1929.

I mean, the 1952 -- again, the idea that you can reenact something that is so clearly motivated by racial

animus without talking about it, and that that would be sufficient to cleanse it from that animus I think is a separate and independent point.

But to -- to -- if the Court is concerned especially regarding that 1952 reenactment, or somehow thinks that the silence satisfies the burden that it would have been reenacted despite this animus, I think that that testimony can be helpful.

But I will also say that in light of the government's concession that the 19 -- which has also been recognized by the Ninth Circuit, that the 1952 reenactment was absolutely silent about 1925 and 1926, they --

THE COURT: You mean 1325 and 1326. You said 1925 and 1926.

MS. GORMAN: Oh, sorry, I conflated the two.

But to the extent that the government's argument is that their silence is sufficient should the Court find that the *Arlington Heights* -- that the initial showing of *Arlington Heights* has been made by the defense, and the burden shifts to the government to show that it would have been reenacted despite this animus, this silence of the 1952 legislature on 1326 is sort of very obviously insufficient to overcome it because it was never actually discussed, and so how could anybody ever prove that without racial animus this law would be discussed when it was adopted and carrying forward a

clearly racist law with no discussion, so that standard can never be met.

THE COURT: I think it would be helpful for me to hear from the two experts. I'm going to set an evidentiary hearing.

Peggie will work with counsel to find a convenient time in the next couple of weeks for that evidentiary hearing to be held, and I'm willing to accommodate them if they would want to testify by video as well.

MS. GORMAN: My understanding is that they would testify by video.

THE COURT: So Peggie will work with counsel to find time for the evidentiary hearing, and, Ms. Gorman, how much time do you think should be allocated?

MS. GORMAN: Would it be all right if I emailed Ms. Vannozzi after I speak with both experts?

THE COURT: Yes.

MS. GORMAN: Thank you, your Honor.

THE COURT: All right. Thank you, counsel.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Margaret E. Griener 1/27/2021
Margaret E. Griener, CCR #3, FCRR
Official Reporter

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